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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

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In the Matter of )  
 )  
Definition of Markets for Purposes ) CS Docket No. 95-178  
of the Cable Television Mandatory )  
Television Broadcast Signal Carriage )  
Rules )

TO: The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**COMMENTS OF  
WITHERS BROADCASTING COMPANY OF TEXAS**

Withers Broadcasting Company of Texas, licensee of  
Television Broadcast Station KAVU-TV, Victoria, Texas,  
hereby respectfully submits its Comments in the above-  
captioned proceeding. In so doing, the following is shown:

**Preliminary Statement**

1. These Comments are filed in response to the **Notice  
of Proposed Rule Making** in the above-entitled matter, FCC  
95-489, 1995 WESTLAW 727652, released December 8, 1995.  
Said **NPRM** established a comment date of January 19, 1996 and  
a reply date of February 8, 1996.

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### **Factual Background**

2. KAVU-TV operates on UHF Channel 25. It is one of two commercial stations licensed to Victoria, a community of 55,076 residents located in south Texas' Victoria County, population 74,361<sup>1</sup>.

3. The principal cities of television markets closest to Victoria are: Corpus Christi, 73 miles to the south; San Antonio, 100 miles to the northwest; and Houston, 119 miles to the northeast<sup>2</sup>.

4. For many years, Victoria was rated by both the Arbitron and Nielsen organizations as a separate and distinct television market. For example, the **Television and Cable Factbook No. 59 (1991 Edition)**, at page A-1060, depicts Victoria, Texas as a two-county "Area of Dominant Influence"<sup>3</sup>. At 26,100 television households, Victoria was ranked 205th among "ADIs".

5. However, in 1994, for the first time, Victoria was consolidated with San Antonio by Arbitron, without the

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<sup>1</sup>Population figures for both city and county are from the 1990 Census.

<sup>2</sup>Distances are found in **Air-Line Distances Between Cities in the United States**, U. S. Department of Commerce, Coast and Geodetic Survey, Special Publication No. 238 (1947).

<sup>3</sup>This ADI included Victoria and Calhoun Counties in Texas.

consent of Withers, into the "San Antonio-Victoria" ADI. There is attached hereto as Exhibit B the "Declaration" of former KAVU general manager Betty B. Grimsinger<sup>4</sup> which details that Arbitron's consolidation of Victoria into the San Antonio ADI was based upon KAVU's refusal to subscribe to Arbitron ratings data. This Arbitron-created market has nothing to do with the actual coverage patterns of the two Victoria stations, KAVU-TV and KVCT, neither of which even come close to placing a Grade B signal into San Antonio; likewise, none of the San Antonio stations place a Grade B or better signal over the city of Victoria.

6. Indeed, the Nielsen Station Index continues to find Victoria as a separate Designated Market Area (DMA), the nation's 207th largest market.

**Argument**

7. As demonstrated above, in the case of KAVU-TV and the Victoria region, Arbitron's decision to lump Victoria into the San Antonio market was based upon Arbitron's own economic dictates. That is, Arbitron's refusal to continue

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<sup>4</sup>This was originally submitted to the Commission in 1994 in connection with a petition by Withers that KAVU-TV be treated as being located in a "remaining market" for purposes of the Commission's regulatory fee program, a petition which was ultimately granted.

to consider Victoria as a separate market was based not on demographic considerations or viewing patterns, but rather on Arbitron's inability to sell its ratings data to either of the Victoria television stations.

8. This, therefore, is evidence that it would be arbitrary, capricious and irrational for the Commission to continue to base its cable television "must carry" regulatory scheme on Arbitron data.

9. The federal Administrative Procedure Act, at 5 U.S.C. Sec. 706(2)(A), requires a court reviewing an agency rulemaking action to "hold unlawful and set aside agency action, findings, and conclusions found to be \* \* \* arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ". Under this standard, a reviewing court is obliged to guard against an agency's drawing inferences that are arbitrary in relation to the facts found, no matter how substantial may be the support for those facts, and requires an in-depth review of agency's asserted basis for decision. **Midtec Paper Corp. v. U.S.**, 857 F.2d 1487 (D. C. Cir. 1988).

10. It would be bizarre and unexplainable for the Commission to continue to base its "must carry" rules on a television ratings service which (1) based its market

determinations on its own private economic considerations rather than a selfless, objective evaluation of demographic and viewership factors and (2) no longer compiles or publishes ratings data. The Commission is legally compelled to maintain a regulatory system which is based on sustainable factual information, rather than on convenience<sup>5</sup>. It is clear that the Commission would like to continue using data published in past editions of Warren Publishing's **Television and Cable Factbook**, which relied exclusively on Arbitron information. However, this is not a rational thing, particularly when Nielsen continues to publish current ratings data and current classification of television markets, and Arbitron went out of that business two years ago.

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<sup>5</sup>For the same reason, the Commission ought to "scrap" the concept of "significant viewing", which still has significance in the field of network programming non-duplication protection. Stations, primarily the large VHF stations in major markets, were granted "significantly viewed", and thus "must carry" status, in counties beyond their Grade B contours as the result of a flawed study done over 25 years ago. For example, in Victoria County, Texas, San Antonio's Channels 4, 5 and 12 are shown as "significantly viewed", even though none of those station's Grade B contours encompasses Victoria, Texas; likewise, Corpus Christi's Channel 3 has a Grade B signal which fails to encompass any portion of Victoria. In short, the concept of "significant viewing" has been superseded by the new must carry scheme enacted in the 1992 amendments to the Communications Act.

**Withers' Proposed Rule Change**

11. Withers urges the Commission to adopt Nielsen "Designated Market Area" or "DMA" data as the standard for the next round of "must carry"/"retransmission consent" elections in all fifty states. Section 76.55(e) of the Rules must be amended to make this rule change, which in our view is the only way that the Commission can pass judicial muster under the "arbitrary and capricious" standard.

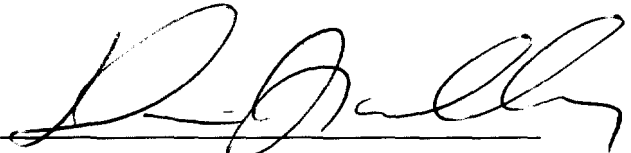
12. In any event, the Commission must take steps to make its rules fair for small market broadcasters. By adopting a scheme which, for example, lumps Victoria in with San Antonio, the Commission is singling out small market television operators for unfair treatment.

**WHEREFORE,** Withers Broadcasting Company of Texas urges the Commission to take action in the above-captioned proceeding in a manner consistent with the Comments set forth herein.

Respectfully submitted,

**WITHERS BROADCASTING COMPANY  
OF TEXAS**

By

A handwritten signature in black ink, appearing to read "D. Kelly", written over a horizontal line.

Dennis J. Kelly  
(D. C. Bar #292631)  
Its Attorney

CORDON AND KELLY  
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Telephone: 410-280-6290

January 19, 1996

DECLARATION

Betty B. Grimsinger, under penalty of perjury, hereby declares as follows:

1. I am General Manager of KAVU-TV, Channel 25, Victoria, Texas. As General Manager of KAVU-TV, I was involved in a telephone conversation on November 1, 1991 with Eric Schindler and Julie Girocco, employees of the Arbitron Ratings Company. I made contemporaneous notes of that conversation, which I have used in giving this Declaration.

2. Mr. Schindler and Ms. Girocco initiated the call to me concerning negotiations between Arbitron and KAVU-TV for a new contract for Arbitron ratings data. At the time, KAVU-TV was a subscriber to Nielsen ratings data; the Nielsen contract was expiring; and Arbitron aspired to supplant Nielsen as KAVU-TV's ratings service.

3. Mr. Schindler and Ms. Girocco made a sales pitch to me in this conversation which included the following points and representations: (1) Arbitron is increasing the number of agencies which subscribe to Arbitron over Nielsen; (2) I should beware of the low rates quoted by Nielsen; (3) Arbitron has better sample numbers in the Victoria market than did Nielsen; (4) Arbitron suggested a monthly rate of \$1,000.00 with no price escalators or yearly increases for a contract period to run between November 1, 1991 through October 31, 1994.

4. When I told Mr. Schindler that Nielsen was offering lower rates, he responded that if the rates were lowered "somewhere down the line Arbitron could make the observation of cutting off surveying Victoria or go ahead and abandon the market". Mr. Schindler continued that the proper rates for Arbitron data in the Victoria market should be "cost plus overhead" with at least 200 diaries and with Victoria being surveyed four times per year. Mr. Schindler stated that Arbitron incurred expenses of \$28,000.00 per year just to process and place the diaries in the Victoria market, not including files, printing, etc.



5. To conclude his presentation to me in this conversation, Mr. Schindler indicated that if KAVU-TV did not subscribe to Arbitron, KAVU-TV would lose the Victoria market being surveyed; he indicated that Victoria would be merged into the San Antonio market. He gratuitously offered that, at the rate Nielsen was offering, Nielsen would ultimately pull out of the Victoria market.

6. KAVU-TV entered into a contract with Nielsen for ratings services, and did not enter into a contract with Arbitron. Nielsen has found, and continues today to find, Victoria to be a separate "Designated Market Area", the 207th largest "DMA" in the nation. Arbitron followed through on its threat to us, and has merged Victoria into the San Antonio ADI.

7. All facts and circumstances stated herein are true and correct to the best of my knowledge, and are made under penalty of perjury.

Betty B. Grimsinger  
Betty B. Grimsinger  
DATED 7/28/94